KAM TECK SOON

v.

TIMBALAN MENTERI DALAM NEGERI, MALAYSIA & ORS AND OTHER APPEALS

FEDERAL COURT, KUALA LUMPUR
AHMAD FAIRUZ CJ (MALAYA)
ABDUL MALEK AHMAD FCJ
MOKHTAR SIDIN JCA
[CRIMINAL APPEAL NOS: 05-25-2001(A), 05-26-2001(A), 05-27-2001(A), 05-28-2001(A), 05-29-2001(A), 05-30-2001(A), 05-31-2001(A) & 05-32-2001(A)]
15 NOVEMBER 2002

CONSTITUTIONAL LAW: *Fundamental liberties - Arrest of persons - Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 3(1) - Right to be informed of grounds of arrest - Federal Constitution, art. 5(3) - Whether parties informed of grounds of arrest - Ordinance silent on right to be informed - Whether art. 5(3) to be read into s. 3(1) - Whether s. 3(1) ought to prevail over art 5(3) - Federal Constitution, art 150(2) and (6)*

CONSTITUTIONAL LAW: *Fundamental liberties - Detention - Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1) - Detention order effected four days after signed by minister - Whether within minister's discretion to do so*

The eight appellants individually forwarded appeals against the respondents before this court which were heard together and it was agreed that the decision of the first appeal would bind the rest.

The appellants were arrested under s. 3(1) and detained under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 on 8 July 1999. It was in evidence that they were not informed of the grounds of arrest. Counsel for the appellants contended that this contravened art. 5(3) of the Federal Constitution (FC). It was submitted that as the Ordinance was silent on the requirement of being informed on the grounds of arrest, therefore art. 5(3) should be read into the former.

Counsel also raised another issue which was confined to the first appellant, this being that the Deputy Minister of Home Affairs had signed the first appellant's detention order on 1 September 1999 but it was to take effect on 5 September.

Held:

Per Ahmad Fairuz CJ (Malaya) (Majority)

[1] In light of art. 150(2) and (6) of the FC, s. 3(1) of the Ordinance could not be said to be invalid due to its inconsistency with art. 5(3). If s. 3(1) was inconsistent with art. 5(3), then the said section must prevail over art. 5(3). This would save the arrest and detention which would have been unlawful because of violation of art. 5(3). This was the purpose of art. 150(6). Furthermore, s. 3(1) only required the arresting officer to have "reason to believe that there are grounds … ." It did not require the grounds to be informed to the arrested person. And even if so required because of art. 5(3), the present facts indicated that the arresting officer had informed the appellant sufficiently to comply with the said article. The grounds were those that would justify a detention under s. 4(1) of the Ordinance and the appellant obviously must have known in substance the reason for the arrest. (p 235 a-d)

[2] Section 3(5) of the Ordinance states in no uncertain terms that the appellant "shall be deemed to be in lawful custody." Therefore, if art. 5(3) applies to arrest and detention under the Ordinance, then s. 3(5) renders the unlawful detention because of the breach of art. 5(3) lawful. (p 236 a-b)

[3] Based on the Supreme Court's decision in *Tan Hoon Seng*, the first appellant's contention regarding the second issue was without merit; more so when the period of the 60 days' detention had expired on 7 September 1999 and the detention order took effect from 5 September 1999. (p 238 a)

[Appeals dismissed.]

Per Abdul Malek Ahmad FCJ (Dissenting)

[1] Article 5(3) of the Federal Constitution provides that a person who is arrested must be informed, as soon as possible, of his grounds of arrest and be allowed the right to legal representation. It is of first importance for a person arrested under s. 3(1) of the Ordinance to know, at the earliest possible moment, by virtue of what power he is being arrested. He must

also be informed, at the same time, of the grounds of his arrest. In the present case, art. 5(3) has not been complied with. Accordingly, the eight appellants ought to be released. (pp 238 d, 244 a & 252 e)

[2] As to the second issue, s. 4(1) of the Ordinance did not provide when the detention order was to begin. Accordingly, since the present detention order stated a commencement date which was after the date of the detention order but before the expiry of 60-day detention period in police custody, thus the first appellant's contention must fail. (p 252 d)

[Appeal on first issue allowed; appeal regarding second issue dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Kesemua lapan perayu secara individu telah menghadapkan rayuan-rayuan terhadap pihak responden di hadapan mahkamah secara serentak dan telah mempersetujui bahawa keputusan rayuan pertama akan mengikat yang selebihnya.

Perayu telah ditangkap di bawah s. 3(1) dan ditahan di bawah s. 4(1) Ordinan Darurat (Ketenteraman Awam dan Pencegahan Jenayah) 1969. Telah dibuktikan bahawa mereka tidak dimaklumkan mengenai alasan-alasan penangkapan. Peguam perayu menghujah bahawa ini bertentangan dengan art. 5(3) Perlembagaan Persekutuan (PP). Telah diutarakan bahawa oleh kerana Ordinan tersebut tidak menyebut apa-apa mengenai perlunya pemberitahuan mengenai alasan-alasan penangkapan, maka art 5(3) harus dibaca ke-dalam peruntukkan s. 3(1).

Peguam juga telah mengutarakan satu lagi isu, yang terhad kepada perayu pertama, iaitu timbalan menteri dalam negeri telah menandatangani perintah penahanan perayu pertama pada 1 September 1999 tetapi ia hanya berkuatkuasa pada 5 September 1999.

Diputuskan:
Oleh Ahmad Fairuz HB (Malaya) (Majoriti)

[1] Merujuk kepada art 150(2) dan (6) PP, s. 3(1) Ordinan tersebut tidak boleh dikatakan taksah disebabkan oleh percanggahannya dengan art 5(3). Jika s. 3(1) tidak konsisten dengan art 5(3), maka seksyen tersebut harus mengatasi art 5(3). Ini sememangnya tujuan art. 150(6). Tambahan pula, s. 3(1) hanya memerlukan pegawai penangkapan untuk mempunyai "sebab untuk mempercayai wujudnya alasan-alasan … ." Ia tidak memerlukan alasan-alasan dimaklumkan kepada pihak yang ditangkap. Jikapun ini diperlukan disebabkan oleh art 5(3), fakta-fakta semasa menunjukkan

bahawa pegawai penangkapan telah memaklumkan perayu dengan secukupnya untuk mematuhi artikel tersebut. Alasan-alasan tersebut adalah mereka yang memberi justifikasi kepada suatu penahanan di bawah s. 4(1) Ordinan dan perayu semestinya telah mengetahui substans alasan untuk penangkapan itu.

[2] Seksyen 3(5) Ordinan mengatakan dengan terangnya bahawa perayu "akan dianggapkan berada dalam tahanan sah." Oleh yang demikian, jika art. 5(3) terpakai kepada tangkapan dan penahanan di bawah Ordinan, maka s. 3(5) menjadikan penahanan taksah disebabkan oleh pelanggaran art 5(3) sah di sisi undang-undang.

[3] Berasaskan keputusan Mahkamah Agung dalam *Tan Hoon Seng*, hujah perayu pertama berkenaan isu kedua tidak mempunyai merit, lebih lagi bilamana tempoh penahanan 60 hari telah luput pada 7 September 1999 dan perintah penahanan berkuatkuasa pada 5 September 1999.

[Rayuan ditolak.]

Oleh Abdul Malek Ahmad HMP (Membantah)

[1] Artikel 5(3) PP memperuntukkan bahawa seseorang yang ditangkap perlu dimaklumkan, secepat mungkin, alasan-alasan penangkapannya dan diberikan hak untuk mendapatkan representasi undang-undang. Adalah merupakan kepentingan yang utama untuk seseorang yang ditangkap dibawah s. 3(1) Ordinan untuk mengetahui, pada seawal mungkin, atas kuasa mana beliau ditangkap. Dia juga harus diberitahu, pada masa yang sama, akan alasan-alasan penangkapannya. Dalam kes semasa, art. 5(3) telah tidak dipatuhi. Dengan itu, kesemua lapan perayu-perayu sepatutnya dibebaskan.

[2] Berkenaan isu kedua, s. 4(1) Ordinan tidak memaklumkan bila perintah penahanan dimulakan. Dengan itu, oleh kerana perintah penahanan semasa menetapkan suatu tarikh permulaan selepas tarikh perintah penahanan tersebut tetapi sebelum tamatnya tempoh perintah penahanan 60 hari dalam tahanan polis, maka hujah perayu pertama harus gagal.

[Rayuan berkenaan isu pertama dibenarkan; rayuan berkaitan dengan isu kedua ditolak.]

Case(s) referred to:

Aminah v. Superintendent of Prison, Pengkalan Chepa, Kelantan [1968] 1 MLJ 92 ***(dist)***

Assa Singh v. Menteri Besar, Johore [1969] 2 MLJ 30 ***(dist)***

Chong Kim Loy v. Timbalan Menteri Dalam Negeri, Malaysia & Anor [1990] 1 CLJ 61; [1990] 1 CLJ (Rep) 731 ***(refd)***

Christie v. Leachinsky [1947] 1 All ER 567 ***(refd)***
In re Madhu Limaye AIR [1969] SC 1014 ***(refd)***
Inspector-General of Police v. Lee Kim Hoong [1979] 2 MLJ 291 ***(refd)***
Menteri Hal Ehwal Dalam Negeri & Anor v. Lee Gee Lam [1993] 4 CLJ 336 ***(refd)***
Mohamad Ezam Mohd Nor & Ors v. Inspector General of Police [2001] 3 CLJ 198 ***(refd)***
B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 28 MLJ 169 ***(refd)***
Tan Hoon Seng v. Minister of Home Affairs, Malaysia [1990] 1 CLJ 423; [1990] 1 CLJ (Rep) 271 ***(refd)***
Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 MLJ 293 ***(refd)***
Wong Fook Nyen v. Timbalan Menteri Dalam Negeri Malaysia & Ors [1988] 2 CLJ 274; [1988] 2 CLJ (Rep) 543 ***(refd)***
Yit Hon Kit v. Minister of Home Affairs, Malaysia & Anor [1988] 2 MLJ 638 ***(refd)***

Legislation referred to:
Constitution (Amendment) Act 1981, s. 15
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3(2), 6(1)
Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(1), (3), (5), 4(1)
Federal Constitution, arts. 5(3), (4), 149(1)(f), 150(2), (6), 151, 162(1)
Malaysia Act 1963, s. 39(2)

Constitution of India, arts. 22(1), (3)

Other source(s) referred to:
Basu's Commentary on the Constitution of India, p 156

For the appellants - MM Athimulan (SP Raman); M/s Athimulan & Co
For the respondents - Noorbahari Baharuddin (Mahmud Abdullah & Mohamad Abazafree Mohamad Abbas SFC)

[Appeal from High Court, Taiping; Criminal Application Nos: 44-25-2000, 44-27-2000, 44-43-2000, 44-62-2000, 44-67-2000, 44-71-2000, 44-02-2001 & 44-07-2001.]

Reported by M Maheswaran

JUDGMENT

Ahmad Fairuz CJ (Malaya):
I am grateful to my learned brother, Abdul Malek Ahmad FCJ, for a sight of his judgment in draft before I wrote this judgment. I agree with my learned brother that two issues were raised by the counsel for the appellants. The first pertains to his contention that the arrest and detention of the appellants violated the first limb of art. 5(3) of the Federal Constitution (FC) and consequently the arrest and detention were improper. As such the detention order under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (hereinafter referred to as "the Ordinance") should be set aside as the continued detention of the appellants is bad in law. The second is confined

to only the first appeal and the issue concerns the signing by the Deputy Minister of Home Affairs of the detention order on 1 September 1999 but to take effect on 5 September 1999.

The First Issue – Article 5(3) FC Violated?

The learned counsel for the appellants pointed out that the requirement to inform the grounds of arrest is not in the Ordinance. As such, the provision of art. 5(3) FC must be read into the Ordinance. In support of his argument he referred us to, amongst others, the cases of *Assa Singh v. Menteri Besar, Johore* [1969] 2 MLJ 30 and *Aminah v. Superintendent of Prison, Pengkalan Chepa, Kelantan* [1968] 1 MLJ 92.

Both the cases of *Assa Singh* and *Aminah* dealt with arrests and detention under the Restricted Residence Enactment (RRE). In his judgment the learned Azmi LP cited art. 162(1) FC which is as follows:

> Subject to the following provisions of this article and article 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this article and subject to any amendments made by Federal or State law.

The learned judge then referred to the case of *B Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 28 MLJ 169 wherein, the Privy Council, when considering the provisions of the Police Ordinance, *inter alia*, said:

> In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution.

Azmi LP then continued:

> As I said, the problem before us may be solved by reading into the Enactment the relevant provisions of the Constitution. This has been done in the case of *Aminah v. Superintendent of Prison Pengkalan Chepa, Kelantan*, where Wan Suleiman J expresses the following view, with respect, I would say, correctly:
>
> > However, it would be absurd to suggest that the absence of any provision similar to article 5(3) would make the whole Enactment void. The proper approach is for the court to apply article 162(6) which reads:
>
> Any court, or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.

On this issue, the learned Ong Hock Thye CJ (Malaya) said:

> ... the validity or otherwise of the pre-Merdeka Restricted Residence Enactment will have to be considered solely by reference to article 162.

On the same issue Suffian FJ said:

> Article 162 on the other hand provides that any pre-Merdeka law such as the Enactment shall continue in force on and after Merdeka Day. That is so even if it is inconsistent with the Constitution. It may, however, be repealed by the appropriate legislature. Until so repealed it may be modified without going to Parliament, simply by order of His Majesty within a period of two years beginning with Merdeka Day for the purpose of bringing its provisions into accord with the Constitution. If it has not been modified by His Majesty under article 162 or if it has not been modified otherwise, then under clause (6) any court applying its provision must apply it with the necessary modifications to bring it into accord with the Constitution.

What is clear from the above excerpts is the fact that the RRE is a pre-Merdeka law. The Ordinance is not. As such I am of the view that the principles in those cases cannot apply to the facts and circumstances in the appeals now before us.

The learned counsel for the appellants also referred us to the case *Inspector-General of Police v. Lee Kim Hoong* [1979] 2 MLJ 291. I find that case is of no assistance to the disposal of the appeals before us as the only issue in that case was whether or not the Ordinance had been laid before Parliament.

The case of *Menteri Hal Ehwal Dalam Negeri & Anor. v. Lee Gee Lam* [1993] 4 CLJ 336 was also referred to us. In that case the Supreme Court held that the High Court was correct in allowing the application for *habeas corpus* because the detention order under s. 4(1) of the Ordinance was vague as to whether the Deputy Minister had applied his mind to the particular circumstances of each respondent's case, or whether he had exercised his power of detention mechanically. Thus I am unable to see the relevance of that case to the issues before us.

In the case of *Yit Hon Kit v. Minister of Home Affairs, Malaysia & Anor.* [1988] 2 MLJ 638, the applicant was not informed "as soon as may be" of the grounds of his arrest. Consequently, it was contended that the applicant's arrest and detention under s. 3(1) of the Ordinance were improper and that the detention order under s. 4(1) must be set aside. On this issue the learned Edgar Joseph Jr. J said:

> Clearly, the fundamental right under Article 5(3) applies to any person, including a person arrested under section 3(1), for as Wan Suleiman J (as he then was) said in *Aminah v. Superintendent of Prisons, Pengkalan Chepa, Kelantan* - 'Article 5 is clearly meant to apply to arrests under any law whatsoever in force in this country.'

The case of *Aminah* as is the case of *Yit Hon Kit* is a decision of the High Court. With the greatest of respect I am of the view that the statement of the learned Wan Suleiman J is too wide and general. Article 149(1)(f) FC and art. 150(6) FC, for instance, show clearly how art. 5 cannot apply to arrests "under any law whatsoever in force in this country". Article 149(1)(f) reads:

> If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:
>
> xxx
>
> (f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,
>
> any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13 or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

Article 150(6) reads:

> Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.

True, as pointed out by the learned Edgar Joseph Jr J, that the Federal Court had in *Assa Singh*'s case upheld this view. However, *Assa Singh*'s case also involves RRE. Just as in *Aminah*'s case, art. 149 and art. 150(6) were never relevant in *Assa Singh*'s case. In the circumstances I am of the opinion that those cases cannot be relevant to the issues in these appeals. Furthermore, *Assa Singh*'s case revolves on the issue of "as soon as may be" as used in art. 5(3).

Our attention was also drawn by the appellants to the case of *In re Madhu Limaye* AIR [1969] SC 1014. In that case Madhu Limaye alleged that he and his companions had not been informed of the grounds for their arrest. There was, therefore, they contended, a violation of art. 22(1) of the Constitution of India which reads:

> No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner.

Article 22(1) is more or less similar to our art. 5(3). It may be useful at this stage for me to refer to art. 22(3) of the Indian Constitution which reads:

> Nothing in clauses (1) and (2) shall apply:
>
> (a) to any person who for the time being is an enemy alien; or
>
> (b) to any person who is arrested or detained under any law providing for preventive detention.

A perusal of the case of *In re Madhu Limaye* will show that the arrest was not done under a law providing for preventive detention. As such I fail to see the relevance of this case to the appeals now before us.

The appellants' counsel also invited us to consider the case of *Chong Kim Loy v. Timbalan Menteri Dalam Negeri, Malaysia & Anor.* [1990] 1 CLJ 61; [1990] 1 CLJ (Rep) 731. In that case the applicant challenged the validity of a detention order made under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). The applicant contended that there had been a contravention of art. 5(4) FC because the applicant had not been produced before a magistrate within 24 hours after his arrest and detention. Article 5(4) reads:

> Where a person in arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:
>
> Provided that this clause shall not apply to the arrest or detention of any person under the existing laws relating to restricted residence, and all the provisions of this clause shall be deemed to have been an integral part of this article as from Merdeka Day.

On this issue the learned Edgar Joseph Jr. J said:

> Now, the Act was passed under art. 149 and its validity is plain beyond argument. (See by analogy the Federal Court cases of *PP v. Lau Kee Hoo* and *Lau Kee Hoo v. PP* where the validity of the Internal Security Act 1960 (No. 82 of 1972) was judicially considered to be plain).
>
> Next, I accept that legislation under art 149 against acts and crimes prejudicial to public order is not *ipso facto* inconsistent with the right conferred by art. 5(4) upon an arrested person to be produced, without unreasonable delay and, in any case, within 24 hours, before a magistrate and he shall not be further

> detained in custody without the magistrate's authority, but any such restriction must be clear in the legislation. (See *Lee Man Seng v. Minister of Home Affairs Singapore & Anor*.). However, the powers of preventive detention spelt out in Part II of the Act, in particular, s. 3(2) appearing therein, do, in my opinion, make such restriction manifestly clear and is therefore valid notwithstanding that it is inconsistent with art. 5(4).

And s. 3(2) of the Act says:

> Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty days without an order of detention having been made in respect of him under subsection (1) of section 6:
>
> Provided that:
>
> (a) he shall not be detained for more than twenty four hours except with the authority of a police officer of or above the rank of Inspector;
>
> (b) he shall not be detained for more that forty eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent of Police;
>
> (c) he shall not be detained for more than fourteen days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf and the Inspector-General or police officer so designated by him, as the case may be, shall forthwith report the same to the Minister.

In the light of the decision in *Chong Kim Loy*'s case, I must, at the outset, stress that the Ordinance was promulgated by the Yang di-Pertuan Agong under art. 150(2) FC. The present art. 150(2) came into force from 15 May 1981 *vide* s. 15 of Act A514. Prior to 15 May 1981 and relevant to these appeals, art. 150(2) was as follows:

> If a Proclamation of Emergency is issued when Parliament is not sitting, the Yang di-Pertuan Agong shall summon Parliament as soon as may be practicable, and may, until both Houses of Parliament are sitting, promulgate ordinances having the force of law, if satisfied that immediate action is required.

The present art. 150(6) FC was inserted by s. 39(2) of Act 26 of 1963 and came into force from 16 September 1963. The relevant art. 150(6) however was as follows:

> No provision of any law or ordinance made or promulgated in pursuance of this Article shall be invalid on the ground of any inconsistency with the provisions of Part II, and Article 79 shall not apply to any Bill for such a law or any amendment to such a Bill.

In the light of art. 150(2) and (6) FC, s. 3(1) of the Ordinance clearly cannot be contended to be invalid just because it is inconsistent with art. 5(3) FC. What is the purpose of not invalidating s. 3(1) if it is not for validating an arrest or detention which becomes unlawful due to non-compliance of art. 5(3)? I am of the view that if s. 3(1) is inconsistent with art. 5(3) then s. 3(1) must prevail over art. 5(3). This would save the arrest and detention which would have been unlawful because of violation of art. 5(3). This in my view is the purpose of art. 150(6) FC. If s. 3(1) is not inconsistent with art. 5(3) then, according to the appellants, violation of art. 5(3) would cause the arrest and detention improper and unlawful. Surely this cannot be the purpose and intention of art. 150(6). Such a construction would make an unlawful arrest (because of contravention of art. 5(3)) lawful because s. 3(1) is inconsistent with art. 5(3) but the arrest would remain unlawful because s. 3(1) is not inconsistent with art. 5(3). This surely would defeat the whole purpose of art. 150. Furthermore, s. 3(1) only requires the arresting officer to have "reason to believe that there are grounds ...". It does not require the grounds to be informed to the arrested person. And even if it is so required because of art. 5(3) FC, I am of the view that what the arresting officer had informed the appellant was sufficient compliance with art. 5(3). The grounds were those that would justify a detention under s. 4(1) of the Ordinance. Viscount Simon in *Christie v. Leachinsky* [1947] 1 All ER 567 at p. 572, said:

> These citations, and others which are referred to by Lord Du Parcq, seem to me to establish the following propositions:
>
> xxx
>
> 4. The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his freedom and is only required to submit to restraint on his freedom **if he knows in substance the reason** why it is claimed that this restraint should he imposed. (emphasis added)
>
> xxx

Obviously the appellant must have known in substance the reason for his arrest ie, that he was arrested because there were grounds which would justify his detention under s. 4(1) of the Ordinance.

If I am wrong in my view that what had been communicated to the appellant by the arresting officer is a sufficient compliance of art. 5(3) FC, then it is my opinion that art. 150(2) and (6) FC clearly show that the provisions of the Ordinance must prevail over the FC. Furthermore s. 3(5) of the Ordinance which reads:

> Any person detained under the powers conferred by this section shall be deemed to be in lawful custody, and may be detained in any prison, or in any police station, or in any other similar place authorized generally or specially by the Minister.

states in no uncertain terms that the appellant "shall be deemed to be in lawful custody". As such if art. 5(3) applies to arrest and detention under the Ordinance, then s. 3(5) makes the unlawful detention because of the breach of art. 5(3) lawful.

Reverting to *Chong Kim Loy*'s case and a perusal of s. 3(2) of the Act and art. 5(4) discussed therein, one can see that a procedure had been set down in each of the section and the article. Similarly, a procedure had been set down in s. 3(1) of the Ordinance and also in art. 5(3). Edgar Joseph Jr. J, in *Chong Kim Loy*'s case, in reference to s. 3(2) of the Act, said: "However, the powers of preventive detention spelt out in Part II of the Act, in particular s. 3(2) appearing therein, do, in my opinion, make such restriction manifestly clear and is therefore valid notwithstanding that it is inconsistent with Article 5(4)." By way of analogy I also hold that "such restriction" (as used by Edgar Joseph Jr. J in *Chong Kim Loy*'s case) was manifestly clear in s. 3(1) of the Ordinance and therefore s. 3(1) is valid notwithstanding that it is inconsistent with art. 5(3).

The Second Issue – The Date Of Signing Of The Detention Order

On this issue, I need only to refer to the case of *Tan Hoon Seng v. Minister of Home Affairs, Malaysia* [1990] 1 CLJ 423; [1990] 1 CLJ (Rep) 271 wherein our Supreme Court dealt with a case of detention under Dangerous Drugs (Special Prevention Measures) Act 1985. Hashim Yeop A. Sani CJ, when delivering the judgment of the court, *inter alia*, said:

> The power of the Minister to make a detention order under the Act is conferred by s. 6(1) of the Act. The power under s. 6(1) of the Act is expressly stated in the following terms, that is to say that whenever the Minister after considering the report of investigation and the report of the inquiry officer is satisfied that a person has been or is associated with any activity relating to or involving the trafficking in of dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order 'direct that such person be detained for a period not exceeding two years from the date of such order'. (emphasis added)
>
> The Act was passed by Parliament in 1985. Prior to the passing of the Act, there were similar statutory powers of preventive detention in existence, namely, the respective provisions in the Internal Security Act 1960 and the Emergency (Public Order and Prevention of Crime) Ordinance 1969.

In s. 8(1) of the Internal Security Act 1960, the power to order detention or restriction of persons is expressed in the following terms, that is to say that if the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services or to the economic life of Malaysia, he may make a detention order 'directing that that person be detained for **any period not exceeding two years.** (emphasis added)

In the Emergency (Public Order and Prevention of Crime) Ordinance 1969, there is a similar power of detention contained in s. 4(1) thereof where if the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order 'directing that that person be detained for **any period not exceeding two years**'. (emphasis added)

It can be seen very clearly that the later law, that is the Act (of 1985), deviated from the previous two legislations on how the period of two years of detention shall be calculated.

The addition of the words 'from the date of such order' must bear some significant meaning. It is clear from those words that the material date for the commencement of the detention is the date when the order is made and signed by the Minister. On this construction, the period of two years must be calculated from the date that the order was made and signed by the Minister and not any other date.

It is not permissible under s. 6(1) of the Act for the Minister to specify a different date from the date of the order for the commencement of the detention **unlike in the case of the previous two legislations where the Minister may from the language of the relevant provisions direct that a person be detained for a period not exceeding two years from a date as may be specified by the Minister.**

In other words, the words 'from the date of such order' in s. 6(1) of the Act must mean what they say, that is from the date that the order is made and signed.

It is to be observed that the legislature did not use words like 'from the date in such order' or 'from the date **as may be specified** in such order' for that would have given the power to the Minister to specify a different date from the date of the order. (emphasis added) **The statute may even be silent on the date of commencement as in the case of the two other legislations referred to earlier**. (emphasis added)

On the strength of *Tan Hoon Seng*'s case, I find that the contention of the appellant on the second issue is without merit; more so when the period of 60 days' detention expired on 7 September 1999 and the detention order took effect from 5 September 1999.

For the reasons stated above I hereby dismiss the appeals.

Abdul Malek Ahmad FCJ:

These eight appeals were heard together as it was agreed that the decision in the first appeal would bind the other seven. Learned counsel for the appellant in the first appeal, who is also representing the other seven appellants, raised two issues, the first a common issue for all eight appeals but the second involves only the appellant in the first appeal.

The first issue is the violation of the appellant's constitutional right under art. 5(3) of the Federal Constitution (hereinafter "the Constitution") which states:

> Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

The appellant was arrested on 8 July 1999 at 4.30pm at the Kuala Lumpur Police Headquarters by Detective Sergeant RF/73176 Abdullah bin Awang who in his affidavit dated 16 August 2000 at para. 4 affirmed that on arresting the appellant, he had told him in the national language, which was translated by Detective Lance Corporal 113770 Tin Kee Seong in the Chinese language using the Cantonese dialect, as follows:

> That you are arrested under section 3(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 as there is reason to believe that there are grounds which would justify your detention under section 4(1).

The said Detective Sergeant had added in that same paragraph that at the time of the arrest, he did not disclose the information received during the investigations relating to the appellant's activities that caused him to have the reason to believe that there were grounds justifying the detention as by doing so it would be contrary to national interest.

It was the contention of learned counsel for the appellant that these facts contravene art. 5(3) of the Constitution and referred to a number of authorities on this point.

The first authority was *Assa Singh v. Menteri Besar, Johore* [1969] 2 MLJ 30 where a strong five-member bench of the Federal Court ruled that the Restricted Residence Enactment did not have provisions similar to those of

arts. 5(3) and 5(4) of the Constitution but this does not make it unconstitutional; despite such inconsistency with the Constitution the Enactment is in force, but it must be applied with such adaptations as may be necessary to bring it into accord with the Constitution.

Azmi LP said:

> It is true that the Enactment has no provisions for informing the person concerned of the grounds of his arrest and detention and for producing him before a magistrate or for an inquiry at which the detained person could meet all the allegations against him.
>
> Under article 162(1) the Yang di-Pertuan Agong could have made modifications to the Enactment in order to bring its provisions in line with the relevant provisions of the Constitution and it is too late for him to do so now.
>
> In my view, the Enactment is not unconstitutional merely because it does not have provisions similar to those of article 5 of the Constitution and in my view therefore the provisions of article 5 which are relevant should be read into the provisions of the Enactment.

Suffian FJ dealt with the issue in this manner:

> It is no doubt true that the Enactment does not contain any of the rights guaranteed by article 5. It does not, however, purport to deny any of these rights; it is merely silent. That does not, in my opinion, make the Enactment contrary to the provisions of the Constitution. This answers the first part of the question.
>
> Coming now to the second part of the question, given that the Enactment does not say anything about the rights guaranteed to an arrested person by article 5, and even assuming, therefore, that it is contrary to the Constitution is the Enactment then void? The answer is to be found in articles 4 and 162.

Clause (1) of art. 4 provides:

> This Constitution is the supreme law of the Federation any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

In a later part of his judgment, he expressed his view as follows:

> Answering the second part of the question posed, even assuming that the Enactment is inconsistent with the Constitution, I say that the Enactment is not void but that it must applied with modifications to bring it into accord with the Constitution. To bring it into accord with the Constitution, there must be read into the Enactment the constitutional rights referred on an arrested person by article 5.

> In my judgment, the rights conferred by clauses (3) and (4) of that article apply where a person is arrested under the Enactment. In this case, I respectfully disagree with Sutherland J in *Chia Khin Sze v. Menteri Besar, State of Selangor* [1958] MLJ 105 and agree with Wan Sulaiman J in *Aminah v. Superintendent of Prisons, Pengkalan Chepa, Kelantan* [1968] 1 MLJ 92.
>
> What are these rights?
>
> First, where a person is arrested under the Enactment he must be informed as soon as may be of the grounds of his arrest.

Some 18 months earlier, Wan Sulaiman J in *Aminah v. Superintendent of Prisons, Pengkalan Chepa, Kelantan (supra)* had discussed the issue in the following way:

> Counsel then referred to article 22(1) of the Indian Constitution, which is indeed substantially the same as our article 5(3). At page 104 of Volume 2 of the 5th Edition of *Basu's Commentary on the Constitution of India* under the heading "Right to be informed of the grounds" appears the following passage:
>
> > Hence, though it is not necessary for the authorities to furnish full details of the offence, sufficient particulars must be furnished to enable the arrested person to understand why he has been arrested. The ground to be communicated to the arrested person should be somewhat similar to the charge framed by the court for the trial of a case. Thus, merely to inform the person that he has been arrested under section 7 of the Criminal Law Amendment Act, 1932, without giving any particulars of the alleged acts for which such action has been taken against him, is not sufficient compliance with article 22(1). (*Vimal Kishore v. State of U.P.* AIR [1956] All. 56 at p. 59 and *Madhu v. Stat*e AIR [1959] Punj. 506).

In a similar situation under the same Ordinance in *Inspector-General of Police & Anor. v. Lee Kim Hoong* [1979] 2 MLJ 291, Harun J (as he then was) stated as follows:

> To exercise its powers under section 3 of the 1969 Ordinance, the police must have known on February 16, 1979 the grounds for arresting and detaining the applicant. It is clear from the wording of the section that the police must have this knowledge before the arrest since under section 3(2) there must be failure to satisfy grounds (i) or (ii); or suspicion of ground (iii); or reason to believe grounds (iv) or (v) or grounds (i), (ii) or (iii) of section 3(1). There is no question of arresting a person first under this section and after enquiries to determine if possible the particular grounds of his arrest and subsequent detention. The purpose of the enquiry is merely to confirm or otherwise the reasons for the belief or suspicion or the failure to give a satisfactory explanation required by the police.

Article 5(3) of the Federal Constitution reads:

> Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

In applying this constitutional provision to an arrest under section 3 of the 1969 Ordinance, there is no reason why Lee could not have been informed of the grounds of his arrest on February 16,1969. Now this is precisely the information which his solicitor was seeking on February 16, 1979 and for the next ten days before instituting these proceedings. Even now the applicant, his solicitor and family still do not know. I should make it clear that the police are not being called upon to disclose the evidence which led to the arrest and detention but merely the grounds of arrest. All the Police have to say, for example, is that "Lee was arrested because we have reason to believe that it is necessary for the prevention of crimes involving violence."

I realise the police have a difficult duty to perform to maintain the public peace and security. They should by all means exercise their powers under the law but in exercising these extra-ordinary powers of detention without trial, they should be careful not to raise in the minds of the public any suspicion of tyranny. They cannot avoid such suspicion if a man is detained by them for days without any reason being given. I think, this failure to communicate is the real complaint in this application.

However, he held that the applicant in that case was being detained under a law which no longer exists and therefore his detention was unlawful. The only issue in the Federal Court was whether the Ordinance has been laid before Parliament and in allowing that appeal on that point, the issue before us was not exactly examined and determined.

In *Christie and Another v. Leachinsky* [1947] All ER Vol. 1 HL 567, the House of Lords ruled that an arrest without warrant, either by a policeman or by a private person, can be justified only if it is an arrest on a charge which is made known to the person arrested unless the circumstances are such that the person arrested must know the substance of the alleged offence, for example, where the alleged wrongdoer is caught red-handed, or where he forcibly resists arrest; the circumstances of the present case were not covered by any such qualification; and, therefore, the initial arrest and imprisonment were unlawful and constituted false imprisonment.

In *Re Madhu Limaye* AIR [1969] SC 1014, Grover, J had this to say about art. 22(1) of the Constitution of India, which is similar to our art. 5(3) of the Constitution:

Article 22(1) embodies a rule which has always been regarded as vital and fundamental for safeguarding personal liberty in all legal systems where the Rule of law prevails. For example, the 6th Amendment to the Constitution of the United States of America contains similar provisions and so does Article XXXIV of the Japanese Constitution of 1946. In England whenever an arrest is made without a warrant, the arrested person has a right to be informed not only that he is being arrested but also of the reasons or grounds for the arrest. The House of Lords in *Christie v. Leachinsky*, 1947-1 All ER 567 went into the origin and development of this rule. In the words of Viscount Simon if a policeman who entertained a reasonable suspicion that X had committed a felony were at liberty to arrest him and march him off to a police station without giving any explanation of why he was doing this, the *prima facie* right of personal liberty would be gravely infringed. Viscount Simon laid down several propositions which were not meant to be exhaustive. For our purposes we may refer to the first and the third:

> 1. If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.
>
> 2. ...
>
> 3. The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.

Lord Simonds gave an illustration of the circumstances where the accused must know why he is being arrested:

> There is no need to explain the reasons of arrest if the arrested man is caught red-handed and the crime is patent to high Heaven.

The two requirements of clause (1) of Article 22 are meant to afford the earliest opportunity to the arrested person to remove any mistake, misapprehension or misunderstanding in the minds of the arresting authority and, also to know exactly what the accusation against him is so that he can exercise the second right, namely, of consulting a legal practitioner of his choice and to be defended by him. Clause (2) of Article 22 provides the next and most material safeguard that the arrested person must be produced before a Magistrate within 24 hours of such arrest so that an independent authority exercising judicial powers may without delay apply its mind to his case.

In *Yit Hon Kit v. Minister of Home Affairs, Malaysia & Anor.* [1988] 2 MLJ 638, the relevant facts stated in the judgment were these:

> According to the affidavit evidence, it appears that the applicant was arrested at 10 a.m. on December 24, 1985, at his home in Selayang, Selangor, by Inspector Ng Siew Thiam of the Anti-Secret Societies section of the Rawang Police Station, Selangor, not for secret society activities generally but for suspicion of involvement in the murder of a man at Jalan Sultan Abdullah, Teluk Intan, in the year 1984. However, the applicant was never charged for that murder and we do not know why.
>
> Be that as it may be, on the same day, at about 5 a.m. the applicant was handed over to Inspector Tai Cheng Boon attached to the Anti-Secret Societies section of the Teluk Intan police station and taken there for further investigations and action.
>
> Oral evidence adduced before me, pursuant to a notice to cross-examine dated April 3, 1986, disclosed that the applicant remained in custody in the lockup there until about 8.05 a.m. on December 26, 1985, when P.C. Hosni Bin Tahir, attached to the Anti-Secret Societies Office, Teluk Intan police station, acting on instructions from his superior, Inspector Tai Cheng Boon, took him out of the lockup and brought him to that office which was about 40 feet away. P.C. Hosni then effected formal arrest for purposes of section 3(1) and made a report (exhibit "HBT1" enclosure 9) at about 8.10 a.m. on the same day, a translation whereof reads as follows:
>
> > I believe from the available proof there are grounds of detain the subject of Yit Hon Kit Identity Card No: 8218951 Age: 30 years. Address: No. 139A, Salak South, Kuala Lumpur. He was arrested at: Police Station, Teluk Intan, Perak.
> >
> > On: 26/12/85 Time: 8.10a.m.
> >
> > Arrested under section 3(1) Emergency Ordinance 5/69, for further investigation.
> >
> > Signature
> >
> > (Hosni Bin Tahir) D.Const.66249.
>
> P.C. Hosni next confirmed a fact of no little importance. He said that the only instructions he received from Inspector Tai were to bring the applicant out of the lockup, arrest him and make a report. There were no other instructions. So he merely carried out those instructions. He then confirmed, "Yes, that was why I did not tell the applicant of reasons for arrest.".

It was held by Edgar Joseph Jr. J (as he then was) in allowing the application for *habeas corpus* that it is of first importance for a person arrested under s. 3(1) of the Ordinance to know, at the earliest possible moment, by virtue of what power he is being arrested. He must also be informed, at the same time, of the grounds of his arrest. It was held that there was an improper arrest and detention under s. 3(1) of the Ordinance for non-compliance with the first limb of art. 5(3) of the Constitution and that in any event, the applicant's detention during the period when enquiries under s. 3(1) of the Ordinance ended and the detention under s. 4(1) of the Ordinance began was unlawful.

The reply from leading senior federal counsel opened with a reference to art. 151 where he cited cl. (1)(a) and cl. (3) respectively:

> 151 (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention:
>
> (a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;
>
> (b) xxx.
>
> (2) xxx.
>
> (3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

Then he referred to *Theresa Lim Chin Chin & Ors. v. Inspector General of Police* [1988] 1 MLJ 293 at p. 297 where Salleh LP said:

> First, we agree with the opinion of the Chief Justice that national interest is wider than national security and in fact, in our view, national interest is the same as public interest, but national security is a very different kind of interest altogether. This is clearly recognized by the House of Lords in *Chandler v. DPP* [1964] AC 763 at p. 790:
>
> > The question more frequently arises as to what is and what is not in the public interest. I do not subscribe to the view that the government or a minister must always or even as a general rule use the last word about that but here we are dealing with a very special matter – interfering with the prohibited place which Whetherfield was.
>
> Secondly, section 16 of the ISA and Article 151 clause (3) clearly authorize the executive not to disclose any information relating to national security. In that event, the court could only be limited to what has been presented before it. The police officers who arrested the detainees have sworn affidavits to say

that they have information which made them come to the opinion that they have reason to believe that there were grounds for detaining the appellants under section 8 of the Act and that they are not prepared to disclose this information. Is the court then to declare that the arrest and detention are illegal for no other reason that these officers are not prepared to disclose the information? If there has been no provision of clause (3) of Article 151 and section 16, the matter, of course, could be decided by the court, whether it was really in the interest of the security that such information could be withheld. Thus, in our view no inference of illegality could be imposed on the arrest in the circumstances. It is therefore up to the appellants to show that the arrest and detention are illegal. In other words, even if the test under section 73 is objective, nothing much can be done, in view of the lack of evidence and it is in this context that the court expressed the view that the test is subjective. The expression "subjective and objective tests" is merely a label to show the results of the court's attitude as to whether or not it will or it will not exercise its jurisdiction.

The next authority we were asked to look at was *Mohamad Ezam Mohd. Nor & Ors. v. Inspector General of Police* [2001] 3 CLJ 198 at pp. 217-219 where the High Court dealt with a similar point, although it was in relation to the Internal Security Act 1960, in the following manner at pp. 217-219:

En. Kamarul Hisham, one of the counsel for the applicant, contended that the affidavits affirmed by the three police officers do not comply with the requirements of s. 73(1) and (3) of the ISA. His argument was two fold. Firstly, s. 73(1)(a) requires the arresting officer to set out in full the words of s. 8(1) of the ISA and not merely to make a reference to the latter. This will show that he is satisfied with the requirements of s. 8(1) of the ISA. Secondly, the requirements of s. 73(1) of the ISA must be read into s. 73(3) of the ISA, that is to say, the officer authorizing the detention must also be satisfied with the requirements of s. 73(1)(a) and (b) of the ISA before making the order. In his reply Dato' Abdul Gani Patail argued that the words "... of whom he has reason to believe ..." in s. 73(1) of the ISA require a consideration of the provisions (a) and (b) of the subsection while there is no such requirement in s. 73(3) of the ISA.

In my view the objection raised by En. Kamarul Hisham cannot be sustained. With regard to the first objection it is my view that it is based on a misreading of s. 73(1)(a) of the ISA. Its reference to s. 8 of the ISA is only to the "grounds" which would justify a detention. The grounds of detention are the reasons for which an order of detention is made. What is further set out in s. 8 of the ISA is the purpose for which an order of detention may be made (see *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129). This is specifically required by s. 73(1)(a) of the ISA, that there are grounds which would justify a detention under s. 8 of the ISA. Pursuant to s. 73(1)(b) of the ISA the specific purpose of detention must be identified. A setting out in full of the language in s. 8(1) of the ISA would be fatal as it

would result in the specific purpose of detention being not identified and would also render s. 73(1)(b) superfluous. A more pertinent matter for consideration is whether the arresting officer must set out the grounds for his belief in effecting the arrest. Article 151(3) of the Federal Constitution and s. 16 of the ISA allow the arresting officer to decline to disclose the grounds of his belief which was done in this case. This procedure was recognised in *Re Ong Yew Teck* [1960] MLJ 67 which was adopted by the (then) Supreme Court in *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182. As Salleh Abas LP said in the latter case at p. 187:

> In simple language, what section 73(1) of the Act provides is that a police officer may arrest any person in respect of whom the officer has reason to believe there are grounds to justify the person's detention under section 8 of the Act and that person either has acted or is about to act in a manner prejudicial to the security of the nation. The Penal Code defines 'reason to believe' to mean 'sufficient cause to believe'. Who then is to decide what is sufficient cause under section 73(1) of the Act? That is the crux of the matter.
>
> We hold that since section 73(1) and section 8 of the Act are so inextricably connected, the subjective test should be applied to both. The Court cannot require the police officer to prove to the Court the sufficiency of the reason for his belief under section 73(1).

Thus there is no requirement for the arresting officer to set out the reasons for his belief in effecting the arrest. With regard to the second objection there is no express stipulation in s. 73(3) of the ISA for the officer authorizing the detention to be satisfied with the requirements of s. 73(1)(a) and (b) of the ISA as in the case of the arresting officer. That of course does not mean that an officer authorizing a detention may do so automatically without any consideration of the need to authorise the detention. He must be satisfied that there are reasons to justify the detention. This in effect means that he must be satisfied with the requirements of s. 73(1) (a) and (b) of the ISA. However, he need not disclose the reasons. Any disclosure of the reasons would violate the right conferred by s. 16 of the Act and article 151(3) of the Federal Constitution which the arresting officer has asserted in this case.

At this point, learned counsel for the appellant invited us to refer to an authority in the respondent's bundle of authorities which was *Wong Fook Nyen v. Timbalan Menteri Dalam Negeri Malaysia & 2 Ors.* [1988] 2 CLJ 274; [1988] 2 CLJ (Rep) 543 where the High Court ruled that there was no doubt that the Dangerous Drugs (Special Preventive Measures) Act 1985 was silent as regards the need to inform a person of the grounds of his arrest. Furthermore, the Act was made pursuant to art. 149 of the Constitution. It would, therefore, appear at first blush that s. 3(1) of that Act was deliberately designed to obviate the fundamental constitutional requirement of informing

the person arrested as soon as may be of the grounds of his arrest as entrenched in art. 5(3) of the Constitution. However, there was no express recital or provision in that Act which permits a preventive detention in contravention of art. 5(3) of the Constitution, and in the absence of such, it cannot be lightly assumed that the legislature intended the curtailment of such a fundamental safeguard entrenched in the Constitution. It was also a basic and elementary right of a person to know the grounds of his arrest. Accordingly, in arresting a person under s. 3(1) of that Act, the arresting officer must inform the person arrested of the grounds upon which he was arrested. Upon the affidavit evidence, it was a proper conclusion that sufficient information regarding the grounds of his arrest had been conveyed to the accused.

Since the leading senior federal counsel at that stage was not able to answer a number of pertinent questions on the point from the bench, we adjourned the matter to the following day for him to do further research on it.

On the next day, he reported to us that he was not able to find a similar case both here and abroad. He again referred to art. 22 of the Constitution of India which provides:

> (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.
>
> (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

Next, he cited p. 156 of *Basu's Commentary on the Constitution of India* where it states:

> **Scope of Article 22: Safeguards against arbitrary arrest and detention.** This Article has two parts: One part deals with persons arrested under the ordinary law of crimes and another deals with persons detained under a law of 'preventive detention' (para. 9) *Addl.Secy. v. Alka* [1992] Supp. (I) 496 (paras. 8, 26, 29) – 3 Judges.
>
> (A) Ordinary law: Cls. (1)-(2) provide certain constitutional limitations upon the Union and State Legislatures to make any law of procedure (under Entry 2 of List III, read with Article 21) for depriving a person of his personal liberty. These are: (i) the Arrested person must, as soon as may be after arrest, be informed of the grounds of his arrest, (ii) He must be produced before a

Magistrate, within 24 hours of his arrest (excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate) and then an order of the Magistrate confirming the arrest must be obtained, (iii) The arrested person must be given the opportunity to consult a legal practitioner and to defend himself. *Gopalan v. State of Madras* [1950] SCR 88 (Kania CJ); *Addl. Secy. v. Alka* [1992] Supp. (I) 496 (paras. 8, 26, 29) – 3 Judges.

(B) Law of preventive detention: Cls. (4)-(6) provide certain limitations upon the Union and State Legislatures to make any law providing for 'preventive detention', e.g., detention without trial, under Entries 9 of List I and 3 of List III, – to prevent 'arbitrary arrests' by the Executive under cover of such laws. These limitations are: (i) Government is ordinarily entitled to detain a person in custody only for 3 months. But Parliament is entitled to make a general law laying down in what classes of cases, the detention may exceed three months. (ii) Apart from such law of Parliament (Cl. (7)(a)), Government may detain a person beyond 3 months, without trial, only if it obtains the report of an Advisory Board that there is sufficient cause for such detention (Cl. (4)(a)). (iii) The authority making the detention shall, as soon as may be, communicate to the detenu the grounds of his detention and offer him an earliest opportunity to make representation against such order of detention (Cl. (5)). But the authority will not be bound to disclose facts which may be considered by itself to be against the public interest to disclose (Cl. (6)). Persons detained under a law of preventive detention shall not be entitled to the protection of Cls. (1) & (2). (Cl. (3)(b)). *Addl. Secy. v. Alka (supra)*; *Kochuni v. State of Madras, A.* [1960] SC 1080 (1092).

It is for the Courts to jealously guard that the above limitations are not violated by the Executive or the Legislature. For:

> Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court.

To a question by the court whether art. 5(3) of the Constitution applies to s. 3 of the Ordinance, he submitted that there was no provision in the Ordinance which was contrary to art. 149 of the Constitution.

The second ground only applies to this case. Having been arrested on 8 July 1999 for investigations under s. 3 of the Ordinance, the Honourable Deputy Minister of Home Affairs signed the detention order on 1 September 1999 to take effect on 5 September 1999. The appellant was served with the detention order on 2 September 1999.

Section 3(3) of the Ordinance states:

> (3) Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty days without an order or detention having been made in respect of him under section 4(1):
>
> Provided that:
>
> (a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of inspector;
>
> (b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent;
>
> (c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General of Police or to a police officer designated by the Inspector-General in that behalf and the Inspector-General or the police officer so designated by him, as the case may be, shall forthwith report the same to the Minister.

A similar situation had arisen in *Yit Hon Kit*'s case *(supra)* where the facts stated in the judgment are as follows:

> I have already mentioned, when giving a brief outline of the facts of this case, that the applicant was arrested under section 3(1) by P.C. Hosni at 8.10 a.m. on December 26, 1985. He was then detained "pending enquiries" and the maximum period for this purpose without an order of detention having been made against him under section 4(1) could not exceed 60 days: section 3(3).
>
> It will be recalled that it was on January 31, 1986 that the police applied for and obtained a detention order dated February 17, 1986 under section 4(1) (see para. 4 of affidavit of Encik Ibrahim bin Abdullah dated April 2, 1986 being enclosure 8) which provided for the applicant's detention for a period of two years with effect from February 23, 1986. A copy of the detention order and the connected documents were served on the applicant at 10 a.m. on February 21, 1986 in purported compliance with section 5(1).
>
> In these circumstances, putting the matter at its highest, police enquiries under section 3(1) could, at most, have continued up to the time of the service of the detention order, namely, at 10 a.m. on February 21, 1986, but no longer.
>
> Those being the facts, by what authority was the applicant being detained from 10 a.m. on February 21, 1986 until midnight on February 22, 1986. I am afraid I can find none. If this conclusion is correct, then the question arises how does this affect the detention order under section 4(1)?

In the *Reverend Thomas Pelham Dale*'s case [1881] 6 QBD 376 Brett LJ said this:

> *Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue.* (emphasis added)

And this is what Cotton LJ said at p. 469, 470:

> *I quite agree with Brett LJ that when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act, and if they do not, the person imprisoned may be discharged, although the particulars in which they have failed to follow those powers may be matter of mere form.* (emphasis added)

In *Re Tan Boon Liat* [1977] 2 MLJ 108, 111 Lee Hun Hoe CJ (Borneo) referred to both the above passages with approval.

On this further ground also the detention order should be set aside.

As for the different dates in the detention order, he referred to *Tan Hoon Seng v. Minister of Home Affairs, Malaysia & Anor and Another Appeal* [1990] 1 CLJ 423; [1990] 1 CLJ (Rep) 271 where the facts were that the appellants had been detained under orders made pursuant to s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985. The orders signed by the Deputy Minister were dated and signed on 8 January 1987 but it was expressly stated in the body of the orders that the detention was to take effect from 11 January 1987 in each case. Section 6(1) of that Act gave power to the Minister to make a detention order to direct that a person be detained for a period not exceeding two years from the date of such order. The appellants had applied for *habeas corpus* but these were refused in the High Court. The appellants appealed.

It was held by the Supreme Court that it is not permissible under s. 6(1) of that Act for the Minister to specify a different date from the date of the order for the commencement of the detention and the detention in these cases were therefore invalid and *habeas corpus* should issue.

In that appeal, reference was made to the Ordinance as follows: *a*

> In the Emergency (Public Order and Prevention of Crime) Ordinance 1969, there is a similar power of detention contained in section 4(1) thereof where if the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order 'directing that that person be detained for **any period not exceeding two years**'. (emphasis added) *b*
>
> It can be seen very clearly that the later law, that is the Act (of 1985), deviated from the previous two legislations on how the period of two years of detention shall be calculated. *c*
>
> The addition of the words 'from the date of such order' must bear some significant meaning. It is clear from those words that the material date for the commencement of the detention is the date when the order is made and signed by the Minister. On this construction, the period of two years must be calculated from the date that the order was made and signed by the Minister and not any other date. *d*
>
> It is not permissible under section 6(1) of the Act for the Minister to specify a different date from the date of the order for the commencement of the detention unlike in the case of the previous two legislations where the Minister may from the language of the relevant provisions direct that a person be detained for a period not exceeding two years from a date as may be specified by the Minister. *e*
>
> In other words, the words 'from the date of such order' in section 6(1) of the Act must mean what they say, that is from the date that the order is made and signed. *f*
>
> It is to be observed that the legislature did not use words like 'from the date in such order' or 'from the date **as may be specified** in such order' for that would have given the power to the Minister to specify a different date from the date of the order. (emphasis added) The statute may even be silent on the date of commencement as in the case of the two other legislations referred to earlier. *g*
>
> There is a simple principle of construction and this principle was explained in an old case *R v. Buttle* [1870] LR1 CCR 248 where Blackburn J said at p. 252: *h*
>
> > When the legislature changes the words of an enactment, no doubt it must be taken *prima facie* that there was an intention to change the meaning.

i

> This is a fundamental principle of construction to adhere to unless there is any compelling reason in the context of the statute for the court to construe otherwise. In this case there is none.
>
> The law of preventive detention must be construed strictly and in the case of doubt the court should lean in favour of the subject. See also *Andrew s/o Thamboosamy v. Superintendent of Pudu Prisons Kuala Lumpur* [1976] 2 MLJ 156.
>
> Finally, as this court stressed in *PP v. Koh Yoke Koon* [1988] 2 MLJ 301, a detention not in accordance with law is inconsistent with the fundamental right guaranteed by article 5(1) of the Constitution.

It would appear from the above passage that the appellant cannot rely on that authority as the detention orders there were made under s. 6(1) of the Dangerous Drugs (Special Prevention Measures) Act 1985 where the words "from the date of such order" specifies when the detention orders are to commence. Section 4(1) of the Ordinance, under which provision the appellant is detained, as clarified in that passage, does not provide when the detention order is to begin. Accordingly, since the relevant detention order here states a commencement date which is after the date of the detention order but before the expiry of the 60-day detention period in police custody, the submission on the second issue fails.

To conclude, it is obvious from the authorities cited and on the facts of these cases that art. 5(3) of the Constitution has not been complied with. I would, therefore, agree with the submissions of learned counsel for the appellants only on the first issue and accordingly find that all the eight appeals ought to be allowed. The eight appellants are, therefore, released.

Mokhtar Sidin JCA:

I have had the advantage of reading the judgment of the Hon. Chief Judge (Malaya) and the judgment of Abdul Malek Ahmad FCJ, both in drafts.

I agree with the judgment (in draft) of the learned Chief Judge (Malaya). I agree with the reasonings and the conclusion given by him.

For the above reason, the appeals should be dismissed.